HAJI ALI BIN HAJI PAKEH

v.

PENTADBIR TANAH DAERAH PETALING & 2 ORS.

HIGH COURT, SHAH ALAM
TUAN AZMEL BIN HAJI MAAMOR JC
[ORIGINATING MOTION NO. 21-287-1990]
5 JULY 1993

LAND LAW: Foreclosure proceeding - Chargor's land sold by public auction - Purchaser given 30 days to make full payment for land - Payment period extended by Pentadbir Tanah Daerah to 60 days - Consent of chargee not obtained - Whether extension of time valid - Whether Pentadbir Tanah Daerah had power to grant extension - Application by chargor to revoke sale of land - Whether chargor had locus standi.

The Pentadbir Tanah Daerah Petaling (PTD) sold a piece of land by public auction to the third respondent. At the close of the auction, the third respondent paid the 10% down payment for the land and in accordance with condition 13 of the Conditions of Sale, 30 days were given to the third respondent to submit the balance payment. However, at the request of the third respondent, this time frame was extended by the PTD for a further 60 days. The third respondent sent a copy of the letter requesting for extension of time to the second respondent, the chargee, but the letter was not acted upon by the second respondent one way or the other. The chargor, as registered owner of the land, applied for an order, *inter alia,* that the decision of the PTD in granting the extension of time to pay was invalid, null and void. At the hearing, a preliminary objection was raised as to whether or not the chargor had the necessary locus to make the application he did.

Held:

[1] The chargor/applicant has the *locus standi* to make the application in the present case.

[2] The extension of time was improperly granted by the first respondent. In order to vary the terms of a written agreement such as the Conditions of Sale, it is essential that a written consent to vary be first obtained from the parties concerned. The facts show that no such consent was forthcoming from the chargee.

[3] In the circumstances, the decision of the first respondent in granting the extension of time is set aside, the sale of the said land to the third respondent revoked, and the deposit paid by the third respondent forfeited to the account of the chargee secured less expenses of the auction.

[Application granted].

Cases referred to:

Kuala Lumpur Finance Bhd. v. Yap Boh Khian (Teo Sik Eng & Anor. as Interveners) [1992] 1 MLJ 472 ***(foll)***

Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd. & Anor. [1990] 2 MLJ, 502 ***(foll)***

United Malayan Banking Corp. Bhd. & Anor. v. Pentadbir Tanah Hulu Langat [1992] 1 CLJ 220 ***(refd)***

Chase Manhattan Bank N.A. v. Malayan United Finance Bhd. [1987] 2 CLJ 138 ***(refd)***

Malayan United Finance Bhd. v. Liew Yet Lan [1990] 1 MLJ 317 ***(foll)***

Public Bank Bhd. v. Phan Seng Kee & 2 Ors. [1991] 3 CLJ 2560 ***(foll)***

Legislation referred to:

National Land Code 1965, s. 264 (3)

For the applicant - Rajinder Singh; M/s. Rajinder Singh Veriah & Co.

For the 1st respondent - Salahuddin bin Saidin, Penolong Penasihat Undang-undang Negeri Selangor

For the 2nd respondent - S. Achan; M/s. Tengku Mohamed, Achan & Lim

For the 3rd respondent - Wong Chiong Seng; M/s. Wong Chiong Seng & Co.

JUDGMENT

Azmel bin Haji Maamor JC:

This is an application by the applicant for, *inter alia,* the following orders:

(1) That the sale by the first respondent to the third respondent on 2 February 1990 be set aside;

(2) That the decision of the first respondent in granting an extension of time to the third respondent to pay the balance of the purchase price is invalid and null and void; and

(3) That the deposit paid by the third respondent to the first respondent on 2 February 1990 be forfeited and the amount forfeited less the costs and expenses of the auction be paid to the second respondent to account of the chargee secured.

The applicant, the registered owner of a piece of land held under HS(M) 4507, PT. No. 1118, Mukim Sungai Buluh in the State of Selangor Darul Ehsan (the said land), had charged the said land to the second respondent as security for loan of RM250,000. Because of failure to

service the said loan the second respondent commenced foreclosure proceedings in respect of the said land. On 2 February 1990 the said land was sold by public auction by the first respondent at a price of RM641,000 to the third respondent who paid a deposit of RM 64,100 being 10% of the purchase price. In accordance with condition 13 of the Conditions of Sale the balance of the purchase price of RM 576,900 was to be paid within 30 days of the date of sale which would be on or before 4 March 1990.

On 19 February 1990 the third respondent wrote to the first respondent with a copy to the second respondent applying for extension of time within 30 days of the date of removal of caveats and the court order made therein in order to settle the balance of the purchase price amounting to RM576,900. However, on 26 February 1990 the first respondent in her letter to the third respondent granted an extension of time of 60 days effective from 3 March 1990 to 2 May 1990. It is on this granting of extension of time by the first respondent to the application by the third respondent that the applicant commenced this action.

There are two main issues raised in this case namely:

1. Whether the applicant/chargor has *locus standi* to make this application to Court; and
2. Whether the first respondent (Pentadbir Tanah Daerah Petaling) was right in granting the extension of time to the third respondent/purchaser to pay the balance of the purchase price.

As regard the first issue I refer to the decision of Lim Beng Choon J. on the case of *Kuala Lumpur Finance Bhd. v. Yap Boh Khian (Teo Sik Eng & Anor as Interveners)* [1992] 1 MLJ 472. The situation in the present case is very much similar to that case. Lim Beng Choon J. in arriving at his decision had referred to the case of *Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd. & Anor.* [1990] 2 MLJ 502 where Richard Talalla JC (as he then was) allowed the application made by the chargor to set aside the sale and forfeit the deposit paid by the purchaser. In his judgment His Lordship said:

> With respect I agree with the decision of the learned Judicial Commisioner and I therefore hold that in the present case the defendant has the *locus standi* to apply for the reliefs as set in his application.

In agreeing with the decision of Lim Beng Choon J., I hereby hold that the applicant has the *locus standi* to make the application in the present case.

As regard the second issue I would first of all set out the sequence of events that had taken place:

1. On 2 February 1990 the said land was sold by public auction by the first respondent to the third respondent at the price of RM641,000 of which RM64,100 (10%) was paid by the third respondent and the balance was to be paid within 30 days from the date of auction.
2. On 19 February 1990 the third respondent's solicitors wrote to the second respondent's solicitors asking the second respondent to remove the caveats registered on the said land and the Court restriction order made therein and at the same time informing the second respondent's solicitors of its intention to apply to the first respondent for an extension of time. On the same date the third respondent's solicitors applied to the first respondent for an extension of time to pay the balance of the purchase price to 30 days after the removal of caveats registered on the said land. A copy of the letter was sent to the solicitors for the second respondent/chargee. There was no response from the second respondent on this letter.
3. The first respondent by a letter dated 26 February 1990 granted to the third respondent an extension of time of 60 days effective from 3 March 1990 to 2 May 1990.

On the question whether the Pentadbir Tanah has the power to grant extension of time I wish to refer to a series of cases dealing with this matter. Shankar J. in the case of *United Malayan Banking Corp. Bhd. & Anor v. Pentadbir Tanah Hulu Langat* [1992] 1 CLJ, 220 decided that "once the order for sale has been made it is a final order which can only be varied by the court or a judge except on the issue of postponement of the sale under Section 264 (3) of the National Land Code".

Siti Norma Yaakob J. in the case of *Chase Manhattan Bank N.A. v. Malayan United Finance Bhd.* [1987] 2 CLJ 138 decided as follows:

> In default of payment of the balance within the time limited, the land administrator must declare the auction to be abortive, fix another

auction date and forfeit the deposit to the charges after defraying his expenses in conducting the abortive sale. This is clearly stated in condition 7 of the proclamation of sale. Under condition 12, time is essence of the contract of sale and extent, the land administrator has no authority to grant any extension of time to the purchaser within which to settle the balance of the purchase price. By doing so, the land administrator has clearly acted well beyond the bounds of his authority for which he can be held personally liable.

George J. in the case of *Malayan United Finance Bhd. v. Liew Yet Lan* [1990] 1 MLJ held as follows:

The sale takes place in terms of the order of sale made and the conditions of sale made and the conditions of sale imposed 'in accordance with the order and any determination thereunder by the registrar of the Court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement. In my judgment, no variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties. However, where either the order or the conditions of sale or the National Land Code 1965 specifically reserves any right to vary, then and only then may such a right be exercised.

Lim Beng Choon J. in the case of *Kuala Lumpur Finance Bhd. (supra)* above, agreed with the decision of George J. when he said as follows:

With due respect, I totally agree with what my brethen judge has said in *Liew Yet Lian case.* The SAR had no right whatsoever to grant the extension of time of two weeks vide his letter of 18 October 1989 (see exh YPK 12 annexed to encl 14) for the payment of the balance of the purchase price without the consent of the plaintiffs.

In the case of *Public Bank Bhd. v. Phan Seng Kee & 2 Ors.* [1991] 3 CLJ, 2560 Peh Swee Chin J. (as he then was) held the view as follows:

There could be no doubt therefore that the chargee as vendor and the successful bidders as purchasers, being in the analogous position of two contracting parties could vary the contract of sale in any manner that by consent thought fit subject to the approval of the Court, with the court having to consider the interests of the chargor.

After having considered the various decisions as above stated, I decide to adopt the views that the terms of the Conditions of Sale of a public auction sale may be varied if the parties thereto give their consent, subject to the approval of the Court. Having arrived at this decision, I shall now examine whether the second respondent/chargee who acted as the vendor had given its consent. It is not disputed that the second respondent received a copy of the letter written by the third respondent dated 19 February 1990 to the first respondent applying for the extension of time. It is also undisputed that the second respondent did not respond to that letter. In other words the second respondent remained silent. The question is whether silence amounts to consent in this case. I am of the view that in order to vary the terms of a written agreement such as the Conditions of Sale in this case, it is essential that such consent to vary be positively given and in writing. Hence, merely by keeping silent cannot, in my view, be regarded as having given consent. In this case the second respondent in its affidavit denied giving its consent. In fact, the third respondent had never requested the second respondent for its consent. Its application to the first respondent for extension of time vide letter dated 19 February 1990 was made without first obtaining the consent of the second respondent and was therefore improper and invalid. Hence the extension of time was improperly granted by the first respondent.

In the circumstances I make the following orders:

(1) The decision of the first respondent in granting an extension of time to the third respondent to pay the balance of the purchase price is hereby set aside;

(2) The sale of the said land by the first respondent to the third respondent on 2 February 1990 is hereby revoked;

(3) The deposit paid by the third respondent to the first respondent on 2 February 1990 is hereby forfeited and the amount forfeited less the costs and expenses of the auction shall be paid to the account of the charge secured;

(4) The third respondent shall bear the costs of these proceedings.